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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 729

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Petitioner,

—against—

STRACHAN SHIPPING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on June 27, 1966.

Citation to Opinion Below

The opinion of the Court of Appeals (R. 175), printed in Appendix A hereto, *infra,* p. 1a, is reported in 362 F. 2d 691. The District Court did not render an opinion but its judgment (R. 168) is printed in appellant's appendix record in the Court of Appeals (43a), 9 copies of which have been filed herewith.

Jurisdiction

The judgment of the Court of Appeals (R. 185) was entered on June 27, 1966, and is printed in Appendix B hereto, *infra*, p. 8a. A timely petition for rehearing (R. 186) was filed on July 18, 1966, and was denied without opinion by an order (R. 202) entered on August 5, 1966, printed in Appendix C hereto, *infra*, p. 10a.

Questions Presented

1. Are the jury's answers to the interrogatories irreconcilably inconsistent and, if not, did the lower court fail to reconcile the answers, contrary to the Seventh Amendment and decisions of this Court?

2. If some of the jury's answers to the interrogatories are severable and not inconsistent with other answers, and those severable answers support a judgment for petitioner on the special verdict, do the Seventh Amendment and F. R. Civ. P. 49(a) require that judgment be entered for petitioner?

3. If the jury's answers to the interrogatories are irreconcilably inconsistent, should petitioner's motions for a directed verdict or judgment notwithstanding the verdict have been granted under circumstances which call for an exercise of this Court's power of supervision so as to obviate further litigation?

Constitutional Provision and Rule Involved

The constitutional provision involved is the Seventh Amendment which states, in part, that "no fact tried by a jury, shall be otherwise re-examined by any Court of the United States, than according to the rules of the common law." Also involved is Rule 49(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A., which provides, in part, that the "court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer * * *. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue."

Statement

Rawlinson, an experienced longshoreman (R. 138) employed as a hook-on man (R. 126) by respondent Strachan, an expert (R. 166) independent contracting stevedore (R. 126), was injured while helping load a forty feet length of pipe (R. 127) from a Houston dock onto a ship owned by petitioner Royal (R. 176). Strachan's manager conceded that Strachan should have been able to load the pipe "without any untoward incident" (R. 130).

The pipe, which lay parallel to the ship (R. 138), was raised off the dock by two ship's winches operated by Strachan's winchmen (R. 177). To keep the pipe from hitting part of the ship's rigging, called "shroud" (R. 152), the hook-on men manually swung one end of the pipe

ninety degrees so the winchmen could pull the pipe aboard perpendicular to the vessel (R. 140).

A rope tag line was tied onto some previously loaded lengths of pipe (R. 139) to enable the hook-on men to swing the pipe around by pulling on the line rather than pushing on the pipe (R. 143). Use of a tag line obviated any need and made it physically impractical for the hook-on men to get between the pipe and the ship (R. 164). Strachan's manager conceded that "it would be safer" to use a tag line to load the pipe (R. 132-133). It was Rawlinson's job to put tag lines on the pipe (R. 162). There was no tag line on the pipe which crushed Rawlinson while he was between the pipe and the ship, trying to push one end of the pipe around (R. 164).

It was customary to have a signalman in each gang of longshoremen to help the winchmen load the cargo (R. 129-130, 148). Strachan's contract Safety Rule 14 provided that: "From a safety standpoint, a winch driver shall take signals or orders from but one man" (R. 119). There was no signalman on duty while the pipe which struck Rawlinson was being loaded (R. 150). Strachan's manager conceded that this was "an unsafe practice" (R. 131-132).

One of the hook-on men signaled the winchmen to raise the pipe off the dock (R. 156). Thereafter, the winchmen did not and, the jury found (R. 179), could not see whether Rawlinson was out of the way (R. 155, 162-163). Strachan's contract Safety Rule 24 cautioned that "workmen should keep clear of load being lowered or hoisted" (R. 119) and Strachan's superintendent conceded that it was not customary safe practice for winchmen to move cargo without knowing whether the hook-on men were in the clear (R. 148-149).

Due to lack of a signalman, the winchmen had to "automatically" coordinate their actions after the pipe was raised off the dock (R. 157). Strachan's superintendent immediately investigated the accident in line of duty (R. 146) and concluded that it had been caused by the winchmen's faulty coordination (R. 148). The superintendent prepared a contemporaneous safety program report recommending that similar accidents be prevented by having the longshoremen "be more careful" (R. 147-148).

When it appeared to one of the winchmen that the pipe might hit the shroud, he stopped his winch and held up his hand to signal the other winchman to stop the other winch (R. 159). The other winchman did not immediately stop the other winch, either because he did not and probably could not see the hand signal or because the other winch was defective (R. 177). Strachan's manager conceded that "it is one of these basic uniform safe practices for the winchmen not to give themselves their own signals" (R. 131).

When one end of the pipe hit the shroud, the other end kicked back (R. 160-161) and crushed Rawlinson between the pipe and the ship (R. 177).

After Strachan settled Rawlinson's Texas workmen's compensation claim, Rawlinson sued Royal in a state court and Royal removed to the District Court for Southern Texas because of diversity (R. 176). Royal then brought a F. R. Civ. P. 14(a) third-party action against Strachan for indemnity and settled Rawlinson's suit without prejudice to Royal's indemnity claim against Strachan (R. 176-177).

The District Court (Ingraham, J.) granted Strachan's motion to dismiss Royal's third-party complaint on the ground that, although Royal's claim for indemnity was valid under the doctrine of *Ryan Stevedoring Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124 (1956), "Texas says no." *Rawlinson* v. *Koninklyke Nederlandsche, etc.*, 197 F. Supp. 201, 204 (S. D. Tex. 1961). The Circuit Court reversed and remanded for trial, holding that Texas law did not and constitutionally could not bar Royal's maritime contract indemnity claim. *Koninklyke Nederlandsche, etc.* v. *Strachan Shipping Co.*, 301 F. 2d 741 (5 Cir. 1962), rehear. denied 304 F. 2d 545, cert. denied 371 U. S. 921.

Following trial of the indemnity action, the District Court submitted interrogatories to the jury for a F. R. Civ. P. 49(a) special verdict (R. 177). The jury found that:

—Royal reasonably settled Rawlinson's suit (R. 177). Strachan, which had acknowledged the reasonableness of the settlement amount (R. 137), conceded the conclusiveness of this finding (R. 167).

—The winch which was not immediately stopped was not unseaworthy and, although the winchman continued to operate the winch with the foreman's acquiescence after both of them knew that the winch was defective, this was not a contributing cause of the accident (R. 178) and Strachan did not negligently bring into play any defective condition of the winch (R. 180).

—Although the winchmen did not move the pipe without receiving a signal to do so (R. 179), Strachan's failure to provide one signalman to give all the necessary loading signals was a contributing cause of the accident (R. 178-179).

—Another contributing cause of the accident was movement of the pipe by the winchmen when they could not see whether Rawlinson was between the pipe and the ship (R. 179).

—Another contributing cause of the accident was the absence of a tag line on the pipe (R. 179-180).

—The winchmen raised the pipe in such manner as to create a danger that it would hit the shroud (R. 180).

—Rawlinson was contributorily negligent (R. 180).

The District Court (Ingraham, *J.*) denied Royal's motions for a directed verdict, judgment on the verdict, and judgment notwithstanding the verdict (R. 121) and directed entry of judgment for Strachan because the special verdict left the Court "in a state of confusion and doubt" (R. 168).

Royal appealed on the alternative grounds that it was entitled to judgment on the verdict, but that even if the verdict had been for Strachan, Royal's motions for a directed verdict or judgment notwithstanding the verdict should have been granted.

The Circuit Court reversed and remanded for another trial (R. 183) on the ground that the jury's answers to the interrogatories are irreconcilably inconsistent (R. 182).

REASONS FOR GRANTING THE WRIT

1. The special verdict is not irreconcilably inconsistent and the lower court's failure to harmonize the jury's answers violated the Seventh Amendment and is in conflict with controlling decisions of this Court.

In *Atlantic & Gulf Stevedores* v. *Ellerman Lines,* 369 U. S. 355 (1962) and *Gallick* v. *Baltimore & Ohio R. Co.,* 372 U. S. 108 (1963), the Court granted certiorari "to consider the question whether the decision below improperly invaded the jury's function", 372 U. S., p. 109, and reversed judgments which contravened special verdicts. In *Atlantic & Gulf Stevedores,* after quoting the Seventh Amendment prohibition that "no fact tried by a jury, shall be otherwise reexamined by any Court of the United States, than according to the rules of the common law", 361 U. S., p. 359, the Court held:

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment." 369 U. S., p. 364.

In *Gallick,* the Court emphasized:

> "• • • the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.' *Atlantic & Gulf*

Stevedores, Inc. v. *Ellerman Lines, Ltd.*, 369 U. S. 355, 364. We therefore must attempt to reconcile the jury's findings, by exegesis if necessary, as in *Arnold* v. *Panhandle & S. F. R. Co.*, 353 U. S. 360; *McVey* v. *Phillips Co.*, 288 F. 2d 53 (C. A. 5th Cir.); *Morris* v. *Pennsylvania R. Co.*, 187 F. 2d 837 (C. A. 2d Cir.) (collecting authorities), before we are free to disregard the jury's special verdict and remand the case for a new trial." 372 U. S., p. 119.

Here, no such hermeneutic effort is required since the special verdict is entirely consistent.

Although the lower court was unable to reconcile the jury's findings that the winch was defective but not unseaworthy (R. 178, 182), identical findings were consistently made in *Drago* v. *A/S Inger*, 194 F. Supp. 398 (E. D. N. Y. 1961), aff'd 305 F. 2d 139, cert. denied 371 U. S. 925, where, in answering special interrogatories pertaining to the longshoreman's action against the shipowner, the jury found that the vessel, including the ship's winch, was not unseaworthy, 194 F. Supp., p. 400, and the trial judge, in making additional findings necessary for determination of the shipowner's indemnity claim against the stevedore, found that the winch was "defective", 305 F. 2d, p. 142, because of a missing safety pin, 194 F. Supp., p. 402. The trial judge explicitly recognized his obligation to "make additional findings of fact which must not be inconsistent with the findings expressed in the jury's answers to the interrogatories or necessarily implied in the jury's verdict", 194 F. Supp., p. 401, and the Circuit Court agreed that "the trial judge properly interpreted the jury's verdict and answers to the special interrogatories so as to prevent in-

consistency between the verdict and his disposition of the indemnity claim", 305 F. 2d, p. 141. The consistency of findings that a winch was defective but not unseaworthy results from application of the rule that seaworthiness "is not perfection, but reasonable fitness", *Mitchell* v. *Trawler Racer*, 362 U. S. 539, 550 (1960).

The lower court was also unable to reconcile the jury's findings that, although the winchmen did not move the pipe without receiving a signal to do so, Strachan's failure to provide one man to give all signals necessary to load the pipe was a contributing cause of the accident (R. 178-179, 182). These findings are entirely consistent with the undisputed testimony by Strachan's employees that, contrary to customary safe practices (R. 131-132), there was no signalman on duty while the pipe was being loaded (R. 150) and that after one of the hook-on men—not a signalman—motioned to the winchmen to raise the pipe off the dock (R. 156), the winchmen were then on their own and had to "automatically" coordinate their actions (R. 157) and give themselves their own signals, contrary to Safety Rule 14 (R. 119) and "basic uniform safe practices" (R. 131).

If the jury's answers to the interrogatories are not patently consistent, they certainly are not irreconcilably inconsistent and the lower court's contrary determination violates the Seventh Amendment and is in direct conflict with controlling decisions of this Court.

2. Certain of the jury's answers are entirely consistent, severable, and alone support judgment for Royal on the special verdict and failure to enter judgment for Royal on the verdict violated the Seventh Amendment, conflicts with decisions of other circuit courts, and raises an important, recurrent question of Federal practice which has not been, but should be, settled by this Court.

Even if the jury's answers to the interrogatories dealing with the winch and the signalman were irreconcilably inconsistent, the jury's findings that Royal reasonably settled Rawlinson's suit (R. 177); that a contributing cause of the accident was movement of the pipe by the winchmen when they could not see whether Rawlinson was between the pipe and the ship (R. 179); that another contributing cause was the failure to have a tag line on the pipe (R. 179-180); and that Rawlinson was contributorily negligent (R. 180) are entirely consistent and are severable from the answers pertaining to the winch and signalman.

Although this Court appears never to have passed upon this important and recurrent question of Federal practice, lower courts have held that if favorable answers to all of the special interrogatories are not essential to permit entry of judgment on the verdict, the ambiguously answered, or even unanswered, interrogatories should be ignored.

In *Minneapolis N. & S. Ry. Co.* v. *Skyway Aviation Corp.*, 32 F. R. D. 1 (D. Minn. 1963), aff'd 326 F. 2d 701, there was a claim and counterclaim for collision damage and the jury found that defendant's negligence was a proximate cause of the accident and that, although it could

not decide whether plaintiff was contributorily negligent, any negligence by plaintiff was not a proximate cause of the accident.

> "Since it appears to the Court that the answer to question No. 3 as to plaintiff's negligence was not essential to a resolution of the fact issues involved because the jury had decided by its answer to question No. 4 that even if there was negligence on the part of the plaintiff, such was not a proximate cause of the accident, the Court received the verdict and directed the entry of judgment for the plaintiff * * *." 32 F. R. D., p. 2.

In affirming, the Circuit Court held that:

> "* * * if the jury had answered the question [of plaintiff's contributory negligence] affirmatively, which the trial court pointed out was the most favorable answer defendant could have wished for, the same conclusion would have resulted by reason of the jury's unanimously finding that plaintiff's negligence did not constitute a proximate cause of the collision.
>
> "This was a proper case to invoke Rule 49(a) as it simplified the issues for the jury. The answers and the special verdict were not conflicting or inconsistent. The failure to agree on the unanswered interrogatory did not vitiate the otherwise unanimous verdict effectively disposing of the issues submitted." 326 F. 2d, p. 704.

Getz v. *Robinson*, 232 F. Supp. 763 (W. D. Pa. 1964) involved a similar situation except that the jury found that although plaintiff was contributorily negligent, his

negligence was not a proximate cause of the accident. The Court held that the jury's answers were consistent and, since there was no proximate cause, the finding of contributory negligence was "unnecessary and surplusage", 232 F. Supp., p. 767. Here, the jury's answers to the defective winch interrogatories are also "unnecessary and surplusage" because, although the jury found that the winchman continued to operate the winch after both he and the foreman knew it was defective, the jury found that this was not a contributing cause of the accident (R. 178) and that Strachan did not negligently bring the winch defect into play (R. 180).

In *Gulf Refining Co.* v. *Fetschan,* 130 F. 2d 129 (6 Cir. 1942), cert. denied 318 U. S. 764, plaintiff sued to recover damages resulting from noxious fumes and from flooding. The jury answered special interrogatories in favor of plaintiff on the fume damage and failed to answer any of the interrogatories dealing with the flood damage. The Court affirmed the judgment for fume damage on the ground that even if the jury had answered the flood damage questions in favor of defendant, plaintiff would still be entitled to recover for the fume damage, 130 F. 2d, p. 134.

Here, the jury found that Royal reasonably settled Rawlinson's suit and that Rawlinson was contributorily negligent (R. 177, 180). These two findings alone are sufficient to require entry of judgment on the verdict for Royal even if the jury had unambiguously answered all of the other interrogatories in a manner favorable to Strachan.

> "A ship may recover over against a stevedore for amounts paid in settlement of a personal injury claim

if the injury was caused by breach of the stevedore's warranty of workmanlike service. * * * The elements the ship must establish to recover indemnity from the stevedore are first that the settlement was reasonable under all the circumstances and second that the stevedore was guilty of a breach of the warranty of workmanlike service and has no defense against the shipowner's indemnity claim. * * * Both the jury and Judge Abruzzo found that negligence of the stevedore caused the injury. This was a breach of the warranty of workmanlike service. * * * It is probable that the negligence of the stevedore found by both triers was based solely on the actions of the injured longshoreman. This, however, does not preclude recovery over by the shipowner, but is simply a factor that would reduce the recovery of the injured plaintiff * * * and thus is to be considered only in determining the reasonableness of the settlement." *Damanti* v. *A/S Inger*, 314 F. 2d 395, 397, 399 (2 Cir. 1963), cert. denied 375 U. S. 834.

"Moreover, the plaintiff's own negligence * * * would be sufficient to charge the stevedore with breach of its warranty of workmanlike service." *Nicroli* v. *Den Norske Afrika, etc.*, 332 F. 2d 651, 656 (2 Cir. 1964).

"* * * the finding of contributory negligence established [the shipowner's] right to indemnity as a matter of law." *Mortensen* v. *A/S Glittre*, 348 F. 2d 383, 384 (2 Cir. 1965).

3. Royal's motions for a directed verdict or judgment notwithstanding the verdict should have been granted under circumstances which call for an exercise of the Court's power of supervision so as to obviate further litigation.

Even if the jury's answers were irreconcilably inconsistent, Royal's motions for a directed verdict or judgment notwithstanding the verdict should have been granted. The evidence, largely consisting of testimony and contemporaneous reports by Strachan's employees, conclusively established that, although Strachan should have loaded the pipe "without untoward incident" (R. 130), the accident was caused by Strachan's flagrant disregard of "basic uniform safe practices" (R. 131) and contract "General Safety Rules" (R. 118-119) and the failure of its longshoremen "to be more careful" (R. 147-148) amounting, as a matter of law, to breach of "the stevedore's obligation to perform with reasonable safety", *Italia Societa, etc.* v. *Oregon Stevedoring Co.*, 376 U. S. 315, 319 (1964).

If this case is remanded for another trial, under local practice it will be retried before the same Judge who erroneously granted Strachan's motion to dismiss Royal's claim, with consequent appeal and petition for certiorari, and erroneously entered judgment for Strachan on the special verdict, necessitating a second appeal and petition for certiorari. Another trial is almost bound to result in a third appeal and petition to this Court.

In *Gillespie* v. *U. S. Steel Corp.*, 379 U. S. 148, 153-154 (1964), the Court, motivated by a desire to save further litigation time and expense, granted certiorari to decide a question which, though "fundamental to the further con-

duct of the case", did not and could not finally resolve the case. Here, if any of the questions presented is answered in Royal's favor, that will finally dispose of this case without need or possibility of further litigation. These questions will never be more ripe for determination; indeed, another trial and appeal will tend to obscure them.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM M. KIMBALL
Counsel for Petitioner

APPENDIX A

Opinion Below

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21622

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Appellant,

—versus—

STRACHAN SHIPPING COMPANY, *et al.*,

Appellees.

STRACHAN SHIPPING COMPANY,

Appellant,

—versus—

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

(June 27, 1966.)

Before:

JONES and THORNBERRY, *Circuit Judges,*
and SLOAN, *District Judge.*

JONES, *Circuit Judge*: B. A. Rawlinson, a longshoreman employed by the appellee, Strachan Shipping Company, was injured while participating in the loading of a vessel of the appellant, Royal Netherlands Steamship Company, at a dock in Houston, Texas. He was crushed between a load of pipe, which was being raised from the dock, and the vessel. Strachan's insurance carrier settled with Rawlinson on his Texas workmen's compensation claim. He then sued Royal Netherlands in a state court, claiming unseaworthiness of the vessel and negligence of its owner. Royal Netherlands removed the case to the Federal court, settled with Rawlinson, and filed a third-party complaint against Strachan seeking indemnity. The district court entered a summary judgment for Strachan on the ground that the discharge of its state compensation liability discharged it from all liability arising out of Rawlinson's injury. *Rawlinson* v. *Koninklyke Nederlandsche Stoomboot Maalschappy, N.V.*, 197 F. Supp. 201. This court reversed, holding that under the Ryan doctrine,[1] a state rule of workmen's compensation law cannot prevent a shipowner from enforcing a contractual right of indemnity against a stevedore. *Koninklyke Nederlandsche Stoomboot Maalschappy, N.V.* v. *Strachan Shipping Company*, 301 F. 2d 741, reh. den. 304 F. 2d 545.

The injuries of Rawlinson were sustained while he was engaged, with others, in loading a cargo of pipe on the SS Mentor, owned by Royal Netherlands. A length of pipe was being raised from the dock to the ship by two winches. It appeared to C. E. Hartley, one of Strachan's winchmen, that one end of the pipe might strike a shroud.

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[1] Ryan Stevedoring Co. v. Pan-Atlantic Corporation, 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133; Weyerhaeuser Steamship Co. v. Nacirema Operating Co., 355 U. S. 563, 78 S. Ct. 438, 2 L. Ed. 2d 491.

He stopped his winch and signaled W. E. Hedigar, Strachan's other winchman, to stop his winch. There is a dispute as to whether Hedigar missed the signal and did not attempt to stop the winch, or the winch was defective and did not respond to the winchman's effort to stop it. The winch continued to operate causing the low end of the pipe to swing in against the ship. Rawlinson was caught between the pipe and the ship and the resulting injuries initiated this litigation. Rawlinson's action against Royal Netherlands, in which he asserted both negligence and unseaworthiness, was settled by the payment of $20,000 by Royal Netherlands. It reserved the right to seek indemnity from Strachan. As has been noted, its right to do so was established on the prior appeal.

At the conclusion of the trial the court submitted special interrogatories under Rule 49(a), Fed. Rules Civ. Proc. 28 U. S. C. A. at the request of Royal Netherlands and in the form requested by it. Objections to the interrogatories made by Strachan were overruled and interrogatories requested by Strachan were refused. The questions propounded and the answers returned are as follows:

1. Was it reasonable for Royal to settle Mr. Rawlinson's suit?

You will answer "Yes" or "No".

Answer: Yes

2. Was the high boom winch unseaworthy?

You will answer "Yes" or "No".

Answer: No.

3. (a) Did the high boom winchman continue to operate the winch after he knew that the winch was defective?

Answer: "Yes" or "No".

Answer: Yes

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: No

4. (a) Did the gang foreman fail to stop the high boom winchman from continuing to operate the winch after the gang foreman knew or should have known that the winch was defective?

You will answer "Yes" or "No".

Answer: Yes

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: No

5. (a) Should Strachan have provided one signalman to give all signals necessary to get the pipe which struck Mr. Rawlinson onto the ship?

You will answer "Yes" or "No".

Answer: Yes

(b) If so, was the failure to provide the signalman one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: Yes

6. (a) Did either the outrigger winchman or the high boom winchman move the pipe which struck Mr. Rawlinson without receiving a signal to do so?

You will answer "Yes" or "No".

Answer: "No".

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: "No".

7. (a) Did either the outrigger or high boom winchman move the pipe which struck Mr. Rawlinson without being able to see whether or not Mr. Rawlinson was between the pipe and the ship?

You will answer "Yes" or "No".

Answer: "Yes".

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: "Yes".

8. (a) Was there a tag line on the pipe which struck Mr. Rawlinson?

You will answer "Yes" or "No".

Answer: "No".

(b) If not, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: "Yes".

9. Was Strachan's failure to use a double sling to load the pipe which struck Mr. Rawlinson one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: "No".

10. Did either the outrigger or high boom winchman raise the pipe which struck Mr. Rawlinson in such a manner that there was danger that the pipe would strike the shroud?

You will answer "Yes" or "No".

Answer: Yes

11. (a) Did Strachan negligently bring into play any defective condition of the high boom winch?

You will answer "Yes" or "No".
Answer: No

12. Was a contributing cause of the accident the failure of Mr. Rawlinson to exercise reasonable care for his own safety?
You will answer "Yes" or "No".
Answer: Yes

After the jury had retired, a note from the jury was sent in, making this inquiry:

> "Some questions that follow question No. 2 seem to assume that question No. 2 be answered in the affirmative. However, if No. 2 is answered in the negative, answers to some associated questions seem to be contradictory. Please clarify."

After some discussion, and over the objection of Strachan, the court gave this supplemental instruction:

> "You are instructed to answer each question individually on the basis of the evidence and without regard to the effect which any answer may have upon the judgment to be entered by the court."

Royal Netherlands and Strachan each moved for judgment on the verdict. The motion of Strachan was granted. Royal Netherlands has appealed, and on appeal contends that the cause of the longshoreman's injury was attributable to the stevedore and its employees. It insists that the jury verdict made findings which required a judgment against Strachan, the stevedore. While insisting upon the correctness of the judgment and claiming that the verdict required the entry of the judgment for it, Strachan has attempted to take what it has called a "conditional and pro-

tective cross-appeal. In its support of this cross-appeal it urges that the district court's charge and interrogatories are erroneous. But by a sort of Hudibrastic reasoning, Strachan argues that because Royal Netherlands prepared the instructions and interrogatories it is estopped from challenging the court's judgment.

The framing of questions in such form as to anticipate or assume particular answers to prior questions, coupled with the court's instruction, given in response to an inquiry by the jury, that each question be answered without regard to the effect of any answer upon the court's judgment, undoubtedly created confusion in the minds of the jurors. This confusion, no doubt, caused the inconsistency and conflicts in the jury's responses to the questions as submitted. The jury found that the high boom winch was not unseaworthy but was required to assume that it was defective. The jury found that Strachan should have provided a signalman and its failure to do so was a contributing cause of the accident, but that the winchmen had not moved the pipe without signals. Other comparisons might be made. The inconsistencies and conflicts cannot be reconciled.

Where the answers of the jury, upon which the court's judgment depends, are so ambiguous, or so conflicting and inconsistent that they cannot be reconciled, a special verdict will not support a judgment and the cause must be reversed for a new trial. *Martin* v. *Gulf States Utilities Company,* 5th Cir. 1965, 344 F. 2d 34; *R. B. Company* v. *Aetna Insurance Company,* 5th Cir. 1962, 299 F. 2d 753; *Missouri Pacific Railroad Company* v. *Salazar,* 5th Cir. 1958, 254 F. 2d 847; *Mounger* v. *Wells,* 5th Cir. 1929, 30 F. 2d 521. Such is the case here. The judgment of the district court is reversed and the cause remanded for a new trial. The cross-appeal falls with the reversal on the main appeal.

REVERSED AND REMANDED.

APPENDIX B

Judgment Below

UNITED STATES COURT OF APPEALS,

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1965

No. 21622

D. C. Docket No. 11954—Admirality

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Appellant,

—versus—

STRACHAN SHIPPING COMPANY, *et al.*,

Appellees.

STRACHAN SHIPPING COMPANY,

Appellant,

—versus—

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Before:

JONES and THORNBERRY, *Circuit Judges,*
and SLOAN, *District Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Strachan Shipping Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

June 27, 1966

Issued as Mandate:

APPENDIX C

Order Denying Rehearing

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21622

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Appellant,

—versus—

STRACHAN SHIPPING COMPANY, *et al.*,

Appellees.

STRACHAN SHIPPING COMPANY,

Appellant,

—versus—

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

(August 5, 1966)

Before:

JONES and THORNBERRY, *Circuit Judges,*
and SLOAN, *District Judge.*

PER CURIAM:

IT IS ORDERED That the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

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NO. 741

IN THE

Supreme Court of the United States

October Term, 1966

STRACHAN SHIPPING COMPANY, *Petitioner*

-versus-

ROYAL NETHERLANDS STEAMSHIP COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

E. D. VICKERY,
Counsel for Petitioner

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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NO._____

IN THE

Supreme Court of the United States

October Term, 1966

STRACHAN SHIPPING COMPANY, *Petitioner*

-versus-

ROYAL NETHERLANDS STEAMSHIP COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment in the United States Court of Appeals for the Fifth Circuit, initially entered in the above entitled case on June 27, 1966, with Petitioner's timely motion for rehearing denied on August 5, 1966.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit printed in Appendix "A" hereto, *infra*, p. 15, is reported in 362 F.2d 691 (1966). The District Court did not write an opinion as all of its findings were made by operation of law upon its entry of judgment.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was initially entered on June 27, 1966, and petitioner's timely motion for rehearing denied on August 5, 1966. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1). Jurisdiction in the District Court was predicated upon 28 U.S.C., Sec. 1332.

QUESTIONS PRESENTED

1. Can the Court of Appeals completely disregard the findings of fact made by the Trial Court upon entering judgment by operation of Rule 49(a)[1] and give the Plaintiff below (a steamship company) a new trial on issues which the Plaintiff had expressly refused to submit to the jury?

2. Can the Plaintiff below (a steamship company) be heard to complain of judgment for the Defendant (a stevedoring company) when there has been a complete failure by the Plaintiff to sustain its burden of proving and then requesting and obtaining fact findings from the jury essential to its right to recovery?

STATEMENT

This case has as its setting a situation not at all uncommon to the field of maritime personal injury litigation. B. A. Rawlinson, a longshoreman, was employed by

[1] The portion of Rule 49(a) of the Federal Rules of Civil Procedure which is the subject matter of this writ is as follows: "If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. **As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.**" (Emphasis supplied)

Strachan Shipping Company, a local stevedore, to assist in loading a cargo of steel pipe aboard the SS MENTOR, a vessel owned by Royal Netherlands Steamship Company. Rawlinson was injured on July 23, 1956, while working on the wharf as the result of being caught between a load of pipe and the vessel's inshore side during the time that the load was being operated by the vessel's winches. Rawlinson's action against the vessel owner was predicated upon a malfunction of the winches, and the vessel owner, in an attempt to obtain indemnity, thereafter impleaded the stevedore. The vessel owner obviously appreciated the likelihood of Rawlinson being successful on the liability issue since the third party action was settled for $20,000; however, the indemnity action was retained on the Trial Court's docket with the shipowner proceeding to trial on the theory that Rawlinson's injury resulted from the negligent conduct of the stevedore's employees. Henceforth, for convenience, the parties will be referred to as they were by the Court of Appeals below, simply as Rawlinson (injured longshoreman), Royal (shipowner) and Strachan (stevedore).

Royal's action for indemnity was tried to a jury with Royal having the burden of proving and obtaining fact findings on the following issues:

1. That the settlement made by Royal with Rawlinson was a reasonable one under all the circumstances.
2. That Strachan breached its warranty of workmanlike service to Royal and that such breach was a proximate cause of the accident.
3. That Strachan had no defense to Royal's indemnity claim, that is, that the conduct of Royal was not sufficient to preclude indemnity.

There is no dispute that this was Royal's burden and the pre-trial stipulation of the parties so stated.[2]

Interrogatories were submitted to the jury pursuant to Rule 49(a) of the Federal Rules of Civil Procedure, and all interrogatories and instructions given by the Trial Court were those submitted by and requested by Royal[3] with full assurance to the Trial Court that every aspect of the case was adequately submitted.[4] Not one of Royal's suggested

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[2] R. 84-85. Royal contended that two of the ultimate issues were "3. Did 'Strachan' breach the implied warranty" (the implied warranty of performing the stevedoring operations in a reasonably safe and workmanlike manner) and "6. Was 'Royal' guilty of any conduct which would preclude 'Royal' from recovering indemnity from 'Strachan'?" (Parenthetical expression added from paragraph 2 of the stipulated issues.) See also **Damanti v. A/S Inger,** 314 F. 2d 395, 397 (2nd Cir., 1963), cert. denied at 358 U.S. 834, 11 L.Ed.2d 64, 84 S.Ct. 46 (1963). This Court has held that these two ultimate issues are issues of fact warranting submission to the jury. **Weyerhaeuser Steamship Company v. Nacirema Operating Company,** 355 U.S. 563, 567, 2 L.Ed.2d 491 (1958).

[3] The Trial Court on numerous occasions advised Royal that the charge and interrogatories would conform exactly to Royal's request (R. 40, 42-46, 51, 64, 65, 77 and 79). A perfect example is the Trial Court's decision as set forth at page 51 of the record: "I have decided to submit this case as the plaintiff wants it submitted, and so whatever the plaintiff wants in that respect I will grant it and defendant may have his exceptions."

[4] The Trial Court commented commencing at the bottom of page 42 of the record, "Since you cannot (agree), I am inclined to submit the case exactly as the plaintiff wants it submitted, and let the plaintiff stand or fall on the verdict." The reply given by Royal was: "Needless to say, Your Honor, I have no objection to that. That would be just fine." (Parenthetical expression added)

Royal further advised the Trial Court at page 84 of the record, "If Your Honor pleases: I think if I might say this, so far as the framing of these interrogatories is concerned, I believe your Honor's ultimate decision to do that was entirely correct * * *."

Strachan pointed out to the Trial Court in its exceptions to the charge and interrogatories that there was no inquiry as to whether or not the stevedore breached its warranty of workmanlike service

interrogatories or instructions were denied by the Trial Court and Royal made no objections or exceptions to the charge and made no demand that any other issues be submitted. At the request of Royal, the Trial Court inquired of the jury if the settlement with Rawlinson was reasonable, but Royal neither requested nor did the Trial Court ask the jury to determine the two other remaining facts essential to a judgment in favor of Royal—(1) Did the conduct of Strachan amount to a breach of its warranty of workmanlike service (with the necessary finding on the causation issue to follow) and (2) was Royal's conduct sufficient to preclude a reward of indemnity?

The glaring omission of these two issues by Royal in its charge was apparent to Strachan, whose attorneys requested that these two ultimate fact issues be submitted to the jury.[5] Upon Royal's insistence that these issues did not need to be submitted to the jury, the Trial Court did not submit them.

The jury answered all interrogatories propounded to it,[6] but the jury at no time made findings upon two of the ultimate issues necessary for a judgment in favor of Royal. With these two fact issues being unresolved, the Trial Court exercised its prerogative as provided by Rule 49(a) and

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(R. 72) or if the vessel owner's conduct was sufficient to preclude indemnity (R. 76), and when the Trial Court inquired of Royal if any objections were in order, the reply given was "None is good sir." (R. 77)

[5] Even though Royal was the party obliged to obtain affirmative answers to the two disputed issues of fact, Strachan requested that the interrogatories be submitted (R. 102-103) and excepted to the Trial Court's failure to include them (R. 72 and 76) because of its desire to bring the litigation to a conclusion.

[6] The interrogatories and answers given by the jury are set forth within Appendix "B". It will be noted that the interrogatories do not consist of ultimate issues but rather points of evidence upon which there was a conflict.

entered judgment in favor of Strachan. In so doing, as the plain and unequivocal language of Rule 49(a) provides, the Trial Court "shall be deemed to have made a finding in accord with the judgment." That is, by the plain operation of the Rule 49(a), these two issues which Royal refused to submit to the jury were both resolved against Royal and in favor of Strachan.

Royal filed a timely notice of appeal with the Court of Appeals for the Fifth Circuit, and Strachan filed a protective cross-appeal.[7] The Court of Appeals reversed the Trial Court's judgment and remanded the case for a new trial on the ground that some of the interrogatories were answered by the jury in an inconsistent manner.[8] The inconsistencies in the answers by the jury to the insufficient interrogatories requested by Royal were in no way relied on by the Trial Court in entering judgment for Strachan. Even if the answers had been completely consistent, the Trial Court would still have had to enter judgment for Strachan. In relying on these inconsistencies as a basis for reversal, the Court of Appeals completely ignored the applicability of Rule 49(a) and, although vigorously urged to do so by Strachan both on initial submission and on petition for rehearing, refused to consider Rule 49(a) to any extent. The only possible explanation for this conduct of the Court of Appeals is that it could think of no reasonable basis on which it could reverse the Trial Court's

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[7] The cross-appeal was deemed necessary due to the errors sanctioned by Royal in the Trial Court's charge and interrogatories. Obviously, Royal had no standing to rely upon these errors, and Strachan deemed the protective cross-appeal necessary in order to prevent the Court of Appeals from reversing and rendering judgment in favor of Royal.

[8] The Court of Appeals failed to recognize that only one of the interrogatories submitted to the jury was essential to judgment in favor of the Defendant.

judgment if Rule 49(a) was properly applied as had been done by the same Court of Appeals in two of its own earlier decisions[9] and by the Court of Appeals for the Eighth[10] and Tenth Circuits.[11]

REASONS FOR GRANTING THE WRIT

I. The refusal of the Court of Appeals to recognize the clear applicability of Rule 49(a) is directly in conflict with:

(1) Two of its own previous decisions:

(a) *Delta Engineering Corp. v. Scott*, 5 Cir., 1963, 322 F.2d 11.

(b) *L'Urbaine et la Seine v. Rodriguez*, 5 Cir., 1963, 268 F.2d 1.

(2) With the decision of the Court of Appeals for the Tenth Circuit in:

Aetna Insurance Co. v. Rhodes, 10 Cir., 1948, 170 F.2d 111.

(3) With the decision of the Court of Appeals for the Eighth Circuit in:

Hinshaw v. New England Mutual Life Insurance Co., 8 Cir., 1939, 104 F.2d 45.

This Court should grant this writ to resolve this conflict.[12]

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[9] **Delta Engineering Corp. v. Scott**, 322 F.2d 11, 17 (5th Cir., 1963); and **L'Urbaine et la Seine v. Rodriguez**, 268 F.2d 1, 4 (5th Cir., 1959).

[10] **Hinshaw v. New England Mutual Life Insurance Co.**, 104 F.2d 45, 48 (8th Cir., 1939).

[11] **Aetna Insurance Co. v. Rhodes**, 170 F.2d 111, 115 (10th Cir., 1948).

[12] See full discussion, **infra**, pages 8 to 11.

2. This Court has never ruled upon the scope or application of Rule 49(a) and the failure of the Court of Appeals to give it efficacy in a case clearly within its plain and unequivocal terms presents an important question which this Court should settle to insure the proper administration of cases at the trial court level.[13]

3. In reversing the Trial Court, the Court of Appeals also ignored the basic and fundamental rule of law that the party having the burden of proof must request and obtain all of the jury findings essential to judgment sought.[14]

REASON ONE

Rule 49(a) expressly provides that where, as here, a case is submitted to the jury by the Court on interrogatories that

> ". . . If in so doing the Court (1) omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires (2) he demands its submission to the jury. (3) As to an issue omitted without such demand, the Court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict." (Parenthetical expressions added).

This case falls squarely within this rule because:

(1) At Royal's insistence, the Court's charge omitted two essential issues of fact.

(2) Royal did not demand their submission to the jury before it retired.

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[13] See full discussion, **infra**, pages 11 to 12.

[14] See full discussion, **infra**, pages 12 to 14.

(3) In the absence of such demand by Royal, the Trial Court is deemed to have found such issues in accord with its judgment (That is, in favor of Strachan in this case.)[15]

Notwithstanding these undisputed facts which made this a clear case for the application of Rule 49(a), the Court of Appeals below declined to even mention the Rule and in so doing reached a result that is in direct conflict

1. With two of its own decisions in

   Delta Engineering Corp. v. Scott, 5 Cir., 1963, 322 F.2d 11.

   L'Urbaine et la Seine v. Rodriguez, 5 Cir., 1963, 268 F.2d 1.

2. With the decision of the Court of Appeals for the Eighth Circuit in

   Hinshaw v. New England Mutual Life Insurance Co., 8 Cir., 1939, 104 F.2d 45.

3. With the decision of the Court of Appeals for the Tenth Circuit in

   Aetna Insurance Co. v. Rhodes, 10 Cir., 1948, 170 F.2d 111.

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[15] There is ample evidence in the record in support of these conclusions. The high boom winch operator's testimony was that prior to the accident, he complained to one of the vessel's officers concerning the condition of the winch and that no remedial measures were taken. The following decisions have denied the remedy of indemnity in a similar situation: **Hodgson v. Lloyd Brasileiro Patrimonio Nacional**, 294 F.2d 32 (3rd Cir., 1961), cert. denied 369 U.S. 848, 8 L.Ed.2d 8, 82 S.Ct. 931 (1963); **Smith v. Pan-Atlantic Steamship Corporation**, 161 F.Supp. 422, aff'd. per curiam at 254 F.2d 600 (3rd Cir., 1958); and **Hagans v. Farrell Lines, Inc.**, 237 F.2d 477 (3d Cir., 1956).

All of the foregoing cases follow the plain and unequivocal language of Rule 49(a) which if followed by the Court of Appeals below would have required affirmance of the Trial Court's judgment. But by reversing this case and giving Royal a new trial, the Court of Appeals rewards Royal for not complying with the clear requirements of Rule 49(a). Royal not only did not demand that these two issues be submitted but led the Trial Court into clear error by assuring the Trial Court that they were not necessary.

Rule 49(a) states very simply and categorically that as to an issue omitted from the jury's consideration, the Trial Court is deemed to have made a finding in accord with the judgment unless the complaining party (Royal here) has demanded that the issue be submitted to the jury. In fact, it is difficult to conceive of a more graphic illustration of a case to which Rule 49(a) clearly applies.

The very purpose of Rule 49(a) is to require both Plaintiff and Defendant to demand the submission of all of the essential facts to the jury and if they do not, the Trial Court resolves them upon entry of the judgment. But the decision of the Court of Appeals below permits this Plaintiff (Royal) to request an incomplete charge and when it can't get a judgment on it, to then have a new trial. Followed to its logical conclusion, the decision of the Court of Appeals below would permit Royal to keep failing to comply with Rule 49(a) by submitting incomplete charges indefinitely, always with the assurance that it would get a new trial.[16]

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[16] The Court of Appeals' basic error was in holding that the Trial Court's judgment was dependent upon the jury's answers to

It is this type of conduct which Rule 49(a) was designed to prevent. It is most important that this Court make this perfectly clear so the plain mandate of Rule 49(a) will not be ignored by the Court of Appeals again. To do otherwise is to invite repeated error in the submission of interrogatories always with the assurance that a new trial would be granted whether a demand has been made for a particular issue or not. The result would be chaos in the trial courts.

REASON TWO

This Court has never ruled upon the scope or application of Rule 49(a) and the failure of the Court of Appeals to give it efficacy in a case clearly within its plain and unequivocal terms presents an important question which this Court should settle to insure the expeditious and proper administration of justice at the trial court level.

If the present case is not one for the application of Rule 49(a), what else is necessary to give a judgment finality under this Rule? This Court has never considered the scope of Rule 49(a), and while it is obvious from the language of the Rule that it clearly applies to this case, the Court of Appeals has refused to do so. If the Court of Appeals below is permitted to ignore the unequivocal

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certain interrogatories which were in conflict. The Trial Court's judgment is completely independent of any conflicts in the answers to the interrogatories submitted to the jury, and is based upon the failure of Royal to demand the submission of the two other interrogatories which were essential to establish Royal's right to recover, if any.

language of the Rule without any explanation for doing so, what then is to prevent other courts from doing likewise? Only this Court can authoritatively reaffirm the plain meaning of Rule 49(a). As it is one of the most important Rules in the orderly administration of justice at the trial court level, it is respectfully submitted that this Court should grant this Petition in order that when this Rule is to be applied and when it can be ignored may be understood by both the bench and the bar.

REASON THREE

In reversing the Trial Court, the Court of Appeals also ignored the basic and fundamental rule of law that the party having the burden of proof must request and obtain all the jury findings which are essential to support the judgment sought. This poses the second question presented by this Petition:

> Can the Plaintiff below (a steamship company) be heard to complain of judgment for the Defendant (a stevedoring company) when there has been a complete failure by the Plaintiff to sustain its burden of proving and then requesting and obtaining fact findings from the jury essential to its right to recovery?

The basic error made by the Court of Appeals in reversing this case was in concluding that the Trial Court's judgment was based to any extent on the answers made by the jury to the interrogatories submitted to it.

The judgment of the Trial Court below does not depend to the slightest extent on any of the answers of the jury, but rests firmly on one of the most fundamental and basic principles in American jurisprudence—that a Plaintiff who fails to sustain his burden of proof by obtaining fact

findings on all elements essential to its recovery, is not entitled to a judgment, and judgment must be rendered for the Defendant. This principle is as old as the law itself and as basic to our American system of justice as Courts and Judges. And its application is particularly appropriate in this case where Strachan did everything it possibly could to have the essential elements of Royal's case submitted to the jury and it was only upon the insistence of Royal that these additional interrogatories need not be submitted that the Court declined to do so. For submitting a charge to the Court which could under no circumstances have supported a judgment in its favor, Royal is rewarded with a new trial and Strachan, who did everything it could to insure that all of the fact issues were submitted to the jury in a proper manner is penalized by having to undergo the costs and expense of a new trial to establish its non-liability to Royal.

The Court of Appeals' opinion if permitted to stand has some awesome and far-reaching implications. This for the reason that the reversal and remand of this case for a new trial constitutes a holding that a Plaintiff in the Trial Court does not have the burden of proving and obtaining fact findings by a jury on the essential elements to support its claim for relief. The effect of this remand for a new trial is to hold that a plaintiff no longer has the burden of proving and obtaining the fact findings essential to support its claim, and even though it does not request that the essential elements of its cause of action be submitted to the jury, it does not lose its lawsuit, but simply will be given a second trial at which presumably the Plaintiff will submit all of the essential elements of its cause of action. If on the second trial Royal again fails to request some of the elements essential to its claim for indemnity and

the Trial Court again enters a judgment in favor of Strachan, then, if the opinion in this case is permitted to stand, wouldn't the Court of Appeals again have to reverse for a third trial? Wouldn't this have to go on through as many trials and appeals as might be necessary until the Plaintiff finally requested and had submitted to the jury all of the fact issues essential to its recovery in a single trial? Certainly this Court will not sanction any such result as this.

This is not a matter of significance only in this individual case, but goes to the very heart of our judicial system. If this basic and fundamental concept of American jurisprudence is to be so lightly regarded, endless repeated trials of the same lawsuits will result. The orderly administration of justice at the trial court level requires that this Court reaffirm this basic and fundamental rule of law which for some completely unexplained reason the Court of Appeals declined to consider.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

E. D. VICKERY,
Counsel for Petitioner

November 1, 1966.

APPENDIX A

Opinion Below

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21622

ROYAL NETHERLANDS STEAMSHIP COMPANY,
Appellant,

—versus—

STRACHAN SHIPPING COMPANY, *et al.,*
Appellees.

STRACHAN SHIPPING COMPANY,
Appellant,

—versus—

ROYAL NETHERLANDS STEAMSHIP COMPANY,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

(June 27, 1966.)

Before:

JONES and THORNBERRY, *Circuit Judges,*
and SLOAN, *District Judge.*

JONES, *Circuit Judge:* B. A. Rawlinson, a longshoreman employed by the appellee, Strachan Shipping Company, was injured while participating in the loading of a vessel of the appellant, Royal Netherlands Steamship Company,

at a dock in Houston, Texas. He was crushed between a load of pipe, which was being raised from the dock, and the vessel. Strachan's insurance carrier settled with Rawlinson on his Texas workmen's compensation claim. He then sued Royal Netherlands in a state court, claiming unseaworthiness of the vessel and negligence of its owner. Royal Netherlands removed the case to the Federal court, settled with Rawlinson, and filed a third-party complaint against Strachan seeking indemnity. The district court entered a summary judgment for Strachan on the ground that the discharge of its state compensation liability discharged it from all liability arising out of Rawlinson's injury. *Rawlinson v. Koninklyke Nederlandsche Stoomboot Maalschappy, N.V.*, 197 F.Supp. 201. This court reversed, holding that under the Ryan doctrine,[1] a state rule of workmen's compensation law cannot prevent a shipowner from enforcing a contractual right of indemnity against a stevedore. *Koninklyke Nederlandsche Stoomboot Maalschappy, N.V. v. Strachan Shipping Company*, 301 F.2d 741, reh. den. 304 F.2d 545.

The injuries of Rawlinson were sustained while he was engaged, with others, in loading the cargo of pipe on the SS Mentor, owned by Royal Netherlands. A length of pipe was being raised from the dock to the ship by two winches. It appeared to C. E. Hartley, one of Strachan's winchmen, that one end of the pipe might strike a shroud. He stopped his winch and signaled W. E. Hedigar, Strachan's other winchman, to stop his winch. There is a dispute as to whether Hedigar missed the signal and did not attempt to stop the winch, or the winch was defective and did not

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[1] Ryan Stevedoring Co. v. Pan-Atlantic Corporation, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133; Weyerhaeuser Steamship Co. v. Nacirema Operating Co., 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed.2d 491.

respond to the winchman's effort to stop it. The winch continued to operate causing the low end of the pipe to swing in against the ship. Rawlinson was caught between the pipe and the ship and the resulting injuries initiated this litigation. Rawlinson's action against Royal Netherlands, in which he asserted both negligence and unseaworthiness, was settled by the payment of $20,000 by Royal Netherlands. It reserved the right to seek indemnity from Strachan. As has been noted, its right to do so was established on the prior appeal.

At the conclusion of the trial the court submitted special interrogatories under Rule 49(a), Fed. Rules Civ. Proc. 28 U.S.C.A. at the request of Royal Netherlands and in the form requested by it. Objections to the interrogatories made by Strachan were overruled and interrogatories requested by Strachan were refused. The questions propounded and the answers returned are as follows:

1. Was it reasonable for Royal to settle Mr. Rawlinson's suit?

You will answer "Yes" or "No".

Answer: Yes

2. Was the high boom winch unseaworthy?

You will answer "Yes" or "No".

Answer: No.

3. (a) did the high boom winchman continue to operate the winch after he knew that the winch was defective?

Answer: "Yes" or "No".

Answer: Yes

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: No.

4. (a) Did the gang foreman fail to stop the high boom winchman from continuing to operate the winch after the gang foreman knew or should have known that the winch was defective?

You will answer "Yes" or "No".

Answer: Yes

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: No.

5. (a) Should Strachan have provided one signalman to give all signals necessary to get the pipe which struck Mr. Rawlinson onto the ship?

You will answer "Yes" or "No".

Answer: Yes

(b) If so, was the failure to provide the signalman one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: Yes

6. (a) Did either the outrigger winchman or the high boom winchman move the pipe which struck Mr. Rawlinson without receiving a signal to do so?

You will answer "Yes" or "No".

Answer: "No".

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: "No".

7. (a) Did either the outrigger or high boom winchman move the pipe which struck Mr. Rawlinson without being able to see whether or not Mr. Rawlinson was between the pipe and the ship?

You will answer "Yes" or "No".

Answer: "Yes".

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: "Yes".

8. (a) Was there a tag line on the pipe which struck Mr. Rawlinson?

You will answer "Yes" or "No".

Answer: "No".

(b) If not, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: "Yes".

9. Was Strachan's failure to use a double sling to load

the pipe which struck Mr. Rawlinson one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: "No".

10. Did either the outrigger or high boom winchman raise the pipe which struck Mr. Rawlinson in such a manner that there was danger that the pipe would strike the shroud?

You will answer "Yes" or "No".

Answer: Yes

11. (a) Did Strachan negligently bring into play any defective condition of the high boom winch?

You will answer "Yes" or "No".

Answer: No

12. Was a contributing cause of the accident the failure of Mr. Rawlinson to exercise reasonable care for his own safety?

You will answer "Yes" or "No".

Answer: Yes

After the jury and retired, a note from the jury was sent in, making this inquiry:

> "Some questions that follow question No. 2 seem to assume that question No. 2 be answered in the affirmative. However, if No. 2 is answered in the negative, answers to some associated questions seem to be contradictory. Please clarify."

After some discussion, and over the objection of Strachan, the court gave this supplemental instruction:

> "You are instructed to answer each question individually on the basis of the evidence and without regard to the effect which any answer may have upon the judgment to be entered by the court."

Royal Netherlands and Strachan each moved for judgment on the verdict. The motion of Strachan was granted. Royal Netherlands has appealed, and on appeal contends that the cause of the longshoreman's injury was attributable to the stevedore and its employees. It insists that the jury verdict made findings which required a judgment against Strachan, the stevedore. While insisting upon the correctness of the judgment and claiming that the verdict required the entry of the judgment for it, Strachan has attempted to take what it has called a "conditional and protective cross-appeal." In its support of this cross-appeal it urges that the district court's charge and interrogatories are erroneous. But by a sort of Hudibrastic reasoning, Strachan argues that because Royal Netherlands prepared the instructions and interrogatories it is estopped from challenging the court's judgment.

The framing of questions in such form as to anticipate or assume particular answers to prior questions, coupled with the court's instruction, given in response to an inquiry by the jury, that each question be answered without regard to the effect of any answer upon the court's judgment, undoubtedly created confusion in the minds of the jurors. This confusion, no doubt, caused the inconsistency and conflicts in the jury's responses to the questions as submitted. The jury found that the high boom winch was not unseaworthy but was required to assume that it was defective. The jury found that Strachan should have provided a signal-

man and its failure to do so was a contributing cause of the accident, but that the winchman had not moved the pipe without signals. Other comparisons might be made. The inconsistencies and conflicts cannot be reconciled.

Where the answers of the jury, upon which the court's judgment depends, are so ambiguous, or so conflicting and inconsistent that they cannot be reconciled, a special verdict will not support a judgment and the cause must be reversed for a new trial. Martin v. Gulf States Utilities Company, 5th Cir. 1965, 344 F.22d 34; R. B. Company v. Aetna Insurance Company, 5th Cir. 1962, 299 F.2d 753; Missouri Pacific Railroad Company v. Salazar, 5th Cir. 1958, 254 F.2d 847; Mounger v. Wells, 5th Cir. 1929, 30 F.2d 521. Such is the case here. The judgment of the district court is reversed and the cause remanded for a new trial. The cross-appeal falls with the reversal on the main appeal.

REVERSED AND REMANDED.

APPENDIX B

ANSWERS OF THE JURY TO INTERROGATORIES PROPOUNDED TO IT BY THE COURT UNDER THE PROVISIONS OF RULE 49(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE

1. Was it reasonable for Royal to settle Mr. Rawlinson's suit?

You will answer "Yes" or "No".

Answer: Yes

2. Was the high boom winch unseaworthy?

You will answer "Yes" or "No".

Answer: No

3. (a) Did the high boom winchman continue to operate the winch after he knew that the winch was defective?

Answer: "Yes" or "No".

Answer: Yes

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: No

4. (a) Did the gang foreman fail to stop the high boom winchman from continuing to operate the winch after the gang foreman knew or should have known that the winch was defective?

You will answer "Yes" or "No".

Answer: Yes

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: No

5. (a) Should Strachan have provided one signalman to give all signals necessary to get the pipe winch struck Mr. Rawlinson onto the ship?

You will answer "Yes" or "No".

Answer: Yes

(b) If so, was the failure to provide the signalman one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: Yes

6. (a) Did either the outrigger winchman or the high boom winchman move the pipe which struck Mr. Rawlinson without receiving a signal to do so?

You will answer "Yes" or "No".

Answer: No

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: No

7. (a) Did either the outrigger or high boom winchman move the pipe which struck Mr. Rawlinson without

being able to see whether or not Mr. Rawlinson was between the pipe and the ship?

You will answer "Yes" or "No".

Answer: Yes

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: Yes

8. (a) Was there a tag line on the pipe which struck Mr. Rawlinson?

You will answer "Yes" or "No".

Answer: No

(b) If not, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: Yes

9. Was Strachan's failure to use a double sling to load the pipe which struck Mr. Rawlinson one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: No

10. (a) Did either the outrigger or high boom winchman raise the pipe which struck Mr. Rawlinson in such a manner that there was danger that the pipe would strike the shroud?

You will answer "Yes" or "No".

Answer: Yes

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: Yes

11. (a) Did Strachan negligently bring in to play any defective condition of the high boom winch?

You will answer "Yes" or "No":

Answer: No

(b) If so, was this one of the contributing causes of the accident?

You will answer "Yes" or "No".

Answer: No

12. Was a contributing cause of the accident the failure of Mr. Rawlinson to exercise reasonable care for his own safety?

You will answer "Yes" or "No".

Answer: Yes

Dated: February 6, 1964.

(Signed) WAYNE M. ARMBRECHT
FOREMAN

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IN THE

Supreme Court of the United States

October Term, 1966

No. 729

ROYAL NETHERLANDS STEAMSHIP COMPANY,
Petitioner,

-against-

STRACHAN SHIPPING COMPANY, *Respondent.*

RESPONDENT'S REPLY TO THE PETITION FOR WRIT OF CERTIORARI

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ROYAL NETHERLANDS STEAMSHIP COMPANY,
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RESPONDENT'S REPLY TO THE PETITION FOR WRIT OF CERTIORARI

Respondent, Strachan Shipping Company, would show this Court that Petitioner's Petition for Writ of Certiorari seeking judgment in its favor is unsupportable because the simple facts are that under no circumstances could the decision of the Court of Appeals for the Fifth Circuit be amended to provide for judgment in favor of Royal Netherlands Steamship Company. Not only are the jury's answers to the interrogatories utterly meaningless whether considered separately or collectively, but at no time did Petitioner request or the Trial Court propound interrogatories covering the ultimate issues. For the reasons set forth in its own Petition for Writ of Certiorari, Strachan respectfully submits that the Trial Court's judgment should

be reinstated and the opinion of the Court of Appeals below reversed.[1] Henceforth, for convenience, the parties will be referred to as they were by the Court of Appeals below, simply as Rawlinson (the injured longshoreman), Royal (the vessel owner) and Strachan (the stevedore).

STATEMENT

It is necessary for Strachan to recite the essential facts due to the incomplete and often misleading statement made by Royal. Royal would lead this Court to believe that the sole cause of Rawlinson's injury was the conduct of Strachan's employees; however, the evidence presented several fact issues for jury determination as to the cause of the accident. The opinion of the Court of Appeals set forth some of the disputed facts of the accident rather concisely:

> "The injuries of Rawlinson were sustained while he was engaged, with others, in loading a cargo of pipe on the SS MENTOR, owned by Royal Netherlands. A length of pipe was being raised from the dock to the ship by two winches. It appeared to C. E. Hartley, one of Strachan's winchmen, that one end of the pipe might strike a shroud. He stopped his winch and signaled W. E. Hedigar, Strachan's other winchman, to stop his winch. There is a dispute as to whether Hedigar missed the signal and did not attempt to stop the winch, or the winch was defective and did not respond to the winchman's effort to stop it. The winch continued to operate causing the low end of the pipe to swing in against the ship. Rawlinson was caught between the pipe and the ship and the resulting injuries initiated this litigation. Rawlinson's action against Royal Netherlands, in which he asserted both

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[1] No. 741, October Term, 1966. Strachan Shipping Co. v. Royal Netherlands Steamship Company, Petitioner's writ of certiorari to the U. S. Court of Appeals for the Fifth Circuit.

negligence and unseaworthiness, was settled by the payment of $20,000 by Royal Netherlands. It reserved the right to seek indemnity from Strachan."

In addition to the foregoing disputed facts, other disputed facts were whether Strachan had reported the defective vessel's winch to one of Royal's officers and whether Royal had failed to take any steps to repair its own defective equipment.

With the evidence presenting these disputed facts, the Trial Court at the request of Petitioner as provided for by Rule 49(a) of the Federal Rules of Civil Procedure submitted Royal's action for indemnity upon special interrogatories. In fact, the Trial Court submitted the charge and interrogatories in exactly the form, word for word, requested by Royal with Strachan being permitted to take exceptions.[2] The interrogatories as requested by Royal and submitted by the Trial Court merely inquired into some of the disputed points of evidence and did not ask the jury to pass upon the ultimate issues which were essential to a judgment in favor of Royal.[3]

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[2] R. 40, 42-46, 51, 64, 65, 77 and 79. A perfect example is the Trial Court's decision as set forth at page 51 of the record: "I have decided to submit this case as the plaintiff (Royal) wants it submitted, and so whatever the plaintiff (Royal) wants in that respect I will grant it and defendant (Strachan) may have his exceptions." (Parenthetical names added)

[3] The interrogatories actually submitted were along the lines of "did the load strike the shroud," "was there a tag line on the load," etc. This is most surprising in view of the pre-trial stipulation entered into by Royal in which Royal contended that two of the ultimate fact issues were: "3. Did 'Strachan' breach the implied warranty" (the implied warranty of performing the stevedoring operations in a reasonably safe and workmanlike manner) and "6. Was 'Royal' guilty of any conduct which would preclude 'Royal' from recovering indemnity from 'Strachan'?" (Parenthetical expression added from paragraph 2 of the stipulated issues.) (R. 84-85)

The Court of Appeals reversed the judgment of the Trial Court with remand for a new trial on the basis of the inconsistent and conflicting answers given by the jury to the inadequate interrogatories which were submitted.

The two ultimate issues which were not submitted to the jury for its determination—here again, at Royal's insistence that they were not necessary—were:

1. Whether any conduct of Strachan breached its warranty of workmanlike service to Royal which breach was a proximate cause of the accident.

2. Whether Royal's conduct was sufficient to preclude indemnity.[4]

Having requested the Trial Court to obtain only findings on evidentiary facts and not upon the ultimate issues of breach of warranty and conduct sufficient to preclude, Royal cannot now be heard to complain that these fact issues did not need to be submitted to the jury.[5]

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[4] Strachan's Petition for a Writ of Certiorari, No. 741, October Term, 1966, in this case discusses this failure in detail, pages 2 through 7 and 12 through 14.

[5] Rule 49(a) of the Federal Rules of Civil Procedure provides: "If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. **As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.**" (Emphasis supplied) There are decisions denying indemnity in a situation covering the report by the longshoremen to a representative of the vessel of a defective winch—see **Hodgson v. Lloyd Brasiléiro Patrimonio Nacional,** 294 F.2d 32 (3rd. Cir., 1961) cert. den. 369 U.S. 848, 8 L.Ed. 2d 8, 82 S.Ct. 931 (1963); **Smith v. Pan-Atlantic Steamship Corporation,** 161 F.Supp. 422, aff'd. per curiam at 254 F.2d 600 (3rd. Cir., 1958) and **Hagans v. Farrell Lines, Inc.,** 237 F.2d 477 (3rd. Cir., 1956).

Royal seeks to have this Court grant its Petition and render judgment as a matter of law in this case. Without listing all of the reasons why this cannot be done, there are at least four cogent reasons why this should not and cannot be done:

1. The jury did not pass upon the ultimate issues which are essential to Royal's recovery.[6]

2. The jury was not requested to make a finding as to whether Strachan's conduct was a proximate cause of Rawlinson's injury.[7]

3. No instruction was given by the Trial Court in connection with the interrogatories to confine the jury's deliberation to the reciprocal duties existing between Royal and Strachan. In other words, without such an instruction, the jury was in a position to consider the duties and obligations owed by Royal to Rawlinson, Strachan to Rawlinson, Rawlinson to Strachan, Rawlinson to Royal, etc. The respective duties vary to a great extent and the consequences as to a breach of each duty are vastly different.[8]

4. Nowhere within the Trial Court's charge is there even the remotest inference that Royal had the burden of proof upon the issues which were submitted.[9]

Each reason will be briefly reviewed under separate headings.

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[6] See full discussion, **infra**, pages 6 to 8.

[7] See full discussion, **infra**, pages 8 to 10.

[8] See full discussion, **infra**, pages 10 to 11.

[9] See full discussion, **infra**, pages 11 to 13.

THE ISSUES ESSENTIAL TO ROYAL'S RECOVERY OF INDEMNITY WERE NEVER SUBMITTED TO THE JURY

This Court held almost from the inception of indemnity cases such as this that to recover indemnity the shipowner must establish that the stevedore failed to do its work in a reasonably safe and workmanlike manner, and that the shipowner was not guilty of conduct sufficient to preclude indemnity, and that both of these are fact issues for the jury's determination. In the *Weyerhaeuser* case, this Court stated it quite concisely:

> ". . . If in that regard Respondent (stevedore) rendered a substandard performance which led to foreseeable liability of Petitioner (shipowner), the latter (shipowner) was entitled to indemnity absent conduct on its (shipowner's) part sufficient to preclude recovery. *The evidence bearing on these issues . . . was for jury consideration under appropriate instructions.*[10] (Parenthetical expressions and emphasis added)

This Court reaffirmed this holding in the *Ellerman Lines* case[11] in which a jury, against a background of conflicting evidentiary issues, had answered in the affirmative a direct inquiry as to whether or not the stevedore had performed the cargo operations in accordance with its contractual obligation. This Court reaffirmed that such an issue was one of fact calling for the jury's determination, and in so doing reversed the opinion rendered by the Court of Appeals substituting its contrary conclusion for the answer given by the jury. Various Courts of Appeals have also

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[10] **Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.**, 355 U.S. 563, 2 L.Ed.2d 491, 78 S.Ct. 438 (1958).

[11] **Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.**, 369 U.S. 355, 7 L.Ed.2d 798, 82 S.Ct. 780 (1962).

held that the factors essential to Royal's recovery of indemnity are unquestionably ones of fact,[12] and at no time were these issues essential to a judgment in favor of Royal presented to the jury in this case.

The Trial Court's charge and set of interrogatories are completely void of any inquiry into the ultimate issues upon which Royal has the burden and in reality cover only the contested evidentiary issues.[13] Of course, Royal cannot complain of this omission since the charge and interrogatories were submitted by the Court in exact conformity with Royal's request.[14] What Royal now seeks is to take its own interrogatories, which under no stretch of the imagination present a predicate for recovery, and

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[12] **Waterman Steamship Corp. v. David,** 353 F.2d 660 (5th Cir., 1965), cert. den. 16 L.Ed.2d 683 (1966); **Damanti v. A/S Inger,** 314 F.2d 395, 397 (2nd Cir., 1963), cert. den. 375 U.S. 834, 11 L.Ed.2d 64, 84 S.Ct. 46 (1963); **Moore-McCormack Lines, Inc. v. Maryland Ship Ceiling Co.,** 311 F.2d 663 (4th Cir., 1962); and **McNamara v. Weichsel,** 293 F.2d 900 (2nd Cir., 1961).

[13] **Waterman Steamship Corporation v. David,** 353 F.2d 660, 664 (5th Cir., 1965) cert. den. 16 L.Ed.2d 683 (1966) offers a most up-to-date review of the reciprocal duties existing between the vessel owner and the stevedore. It is stated: "The stevedore's negligence **is immaterial** unless it is a breach of the contractual warranty of workmanlike service and is the proximate cause of the longshoreman's injuries." (Emphasis supplied) All facts as found by the jury in the instant case by analogy are immaterial since at no time did the jury make a finding as to whether the facts so found constituted a breach of Strachan's implied contractual duty owed Royal.

[14] The Trial Court on numerous occasions advised Royal that the charge and interrogatories would conform exactly to Royal's request (R. 40, 42-46, 51, 64, 65, 77 and 79). The Trial Court commented commencing at the bottom of page 42 of the record, "Since you cannot (agree), I am inclined to submit the case exactly as the plaintiff wants it submitted, and let the plaintiff stand or fall on the verdict." The reply given by Royal was: "Needless to say, Your Honor, I have no objection to that. That would be just fine." (Parenthetical expression added)

argue for judgment. The interrogatories as propounded by the Trial Court merely presented to the jury for resolution certain evidentiary points which were in dispute, and at no time was the jury given an opportunity to inquire into the two ultimate issues of fact; namely, did Strachan breach its warranty of workmanlike service and was Royal's conduct sufficient to preclude its action for indemnity.[15]

As these are clearly fact issues for jury determination, this Court cannot determine them as a matter of law as Royal asks it to do.

THE JURY WAS NEITHER REQUESTED TO MAKE NOR DID MAKE ANY FINDING AS TO STRACHAN'S CONDUCT BEING A PROXIMATE CAUSE OF RAWLINSON'S INJURY

Despite the fact that Royal in the Pre-Trial Stipulation stipulated that one of the ultimate issues was whether Strachan's "breach (was) a proximate cause of the accident to Rawlinson,"[16] the interrogatories on causation as requested by Royal and submitted by the Trial Court inquired only as to whether a specific act was a "contributing cause."[17] The error was compounded because the

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[15] In an effort to obtain complete findings of fact and to bring the instant litigation to a conclusion, Strachan requested the submission of interrogatories covering the two issues of fact (R. 101-103), and excepted to the Trial Court's interrogatories due to their exclusion (R. 72 and 76).

[16] R. 85.

[17] Strachan's desire to bring a conclusion to the controversy prompted a request that the term proximate cause be used (R. 102-103), offered a definition of proximate cause in its proposed charge (R. 91) and objected to the use of the term contributing cause (R. 67, R. 72-73).

jury was not given any definition of "causation" by which to be guided in their deliberations. Thus, the issue of causation was improperly and incompletely requested by Royal and erroneously and incompletely submitted by the Trial Court.

Strachan is not jousting with semantics for this Court has made it abundantly clear that the element of foreseeability is to be considered insofar as causation is concerned, and it is elementary that "proximate" and not "contributing" cause is the proper way to submit the issue. In the *Weyerhaeuser* case, the proposition was stated in the following manner:

> ". . . If in that regard Respondent (stevedore) rendered a substandard performance *which led to foreseeable liability of Petitioner (shipowner)*, the latter (shipowner) was entitled to indemnity absent conduct on its part sufficient to preclude recovery . . ." (Parenthetical expressions added and emphasis supplied)[18]

Following this admonition, the Court of Appeals below on other occasions has also held that proximate cause is the issue.[19]

Not only was the wording of the causation issue improper, but at no place within the Trial Court's charge

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[18] **Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.**, 355 U.S. 563, 2 L.Ed.2d 491, 78 S.Ct. 438 (1958).

[19] The Fifth Circuit ruled in **Grace Lines, Inc. v. Port Everglades Terminal Company**, 324 F.2d 699, 702 (5th Cir., 1963): "Moreover, such matters as **foreseeability and proximate cause**, under the facts in dispute, should have been submitted to the jury under appropriate instructions . . ." (Emphasis added). See also **Reddick v. McAllister Lighterage Line**, 258 F.2d 297, 300 (1958) cert. den. 358 U.S. 908, 3 L.Ed.2d 229, 79 S.Ct. 235 (1958).

was there a definition of "contributing cause" or advices to the jury that foreseeability was an ingredient to be considered by the jury in its deliberations on the interrogatories dealing with causation.[20] It is an undisputed axiom that terminology peculiar to the controversy must be defined in the Trial Court's charge and, therefore, the jury's answers to the causation issues are utterly meaningless because the jury was not given any definition of "causation" to use as a standard in measuring Strachan's conduct.

THE JURY'S INQUIRIES WERE NOT LIMITED BY THE COURT'S CHARGE TO THE RECIPROCAL DUTIES WHICH ARE DETERMINATIVE OF THE INDEMNITY ISSUE

At no place within the charge did the Trial Court limit the jury's inquiry to the dispute between Royal and Strachan, but the jury was at liberty to consider the duties owed by Royal to Rawlinson and Strachan to Rawlinson.[21] This Court in *Weyerhaeuser* specifically stated that such a cautionary instruction is essential, for it is stated that:

> ". . . If in that regard Respondent (stevedore) rendered a substandard performance which led to *fore-*

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[20] R. 51-63. The failure to define the term was pointed out to the Trial Court by Strachan (R. 67, 73), but upon the Trial Court's inquiry concerning the objections and exceptions, Royal replied, "None is good, sir." (R. 77).

[21] Rawlinson's action as to Royal was predicated upon the two tort principles of negligence and unseaworthiness. It is clear that Royal's attempt to recover indemnity from Strachan is completely divorced from the tort concept, but is limited solely to contractual considerations. **Italia Societa Per Azioni Di Navigazione v. Oregon Stevedoring Company, Inc.**, 376 U.S. 315, 11 L.Ed.2d 732, 84 S.Ct. 748 (1964), and **Waterman Steamship Corporation v. David**, 353 F. 2d 660, 664 (Headnote 3) (5th Cir., 1965), cert. den. 16 L.Ed.2d 683 (June, 1966).

seeable liability of Petitioner (shipowner), the latter (shipowner) was entitled to indemnity absent conduct on its (shipowner's) part sufficient to preclude recovery. The evidence bearing on these issues—Petitioner's (shipowner's) action in making the shelter on its ship available to Respondent's (stevedore's) employees in Boston although it apparently was unsafe, as well as Respondent's (stevedore's) continued use of the shelter for five days thereafter without inspection—*was for jury consideration under appropriate instructions.* These issues were not encompassed by the instructions in the main case, where the test of Petitioner's (shipowner's) liability was based on failure to perform a non-delegable duty to Connally (injured longshoreman). *Since the liability of Respondent (stevedore) depended upon different principles . . . all fact issues involved in the third party action should have been submitted to the jury* after the verdict in the main case (injured longshoreman's case against shipowner)." (Parenthetical expressions added and emphasis supplied)

Therefore, for this additional reason, Royal's reliance upon the issues submitted to the jury is without foundation because of the failure of the Trial Court to limit the jury's inquiries to the reciprocal duties existing between Royal and Strachan.[22]

THE TRIAL COURT FAILED TO INSTRUCT THE JURY AS TO ROYAL HAVING THE BURDEN OF PROOF TO OBTAIN AFFIRMATIVE ANSWERS TO THE INTERROGATORIES

There is not the remotest reference within the charge of interrogatories submitted to the jury as to which had the burden of proof, and thus the answers to the inter-

[22] This error was called to the Trial Court's attention. (R. 75)

rogatories cannot be relied upon. At no place within the charge did the Trial Court advise the jury that Royal had the burden of proof.[23] Therefore, for this separate and independent reason, Royal's reliance upon the interrogatories as answered by the jury is without merit.

THE INTERROGATORIES AS PHRASED BRING FORTH CONTRADICTIONS

The opinion by the Court of Appeals answers Royal's assertion that the jury's answers to the interrogatories can be logically interpreted so as to support a judgment granting indemnity. The interrogatories, even if answered in a consistent manner, could not form the basis for judgment in favor of Royal since they contain no finding that Strachan breached its warranty or that Royal's conduct did not preclude indemnity. Needless to say inconsistent answers made by a jury in confusion can afford no predicate for a possible recovery on the part of Royal.

ROYAL HAS NO STANDING TO MOVE FOR AN INSTRUCTED VERDICT OR A JUDGMENT NOTWITHSTANDING VERDICT

This Court[24] and various Circuit Courts of Appeals[25] have held that the ultimate issues in an action for in-

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[23] Strachan's suggested charge contained such an instruction (R. 98), and Strachan objected to the failure of the Trial Court to advise the jury as to the burden of proof being on Royal. (R. 76)

[24] **Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.**, 369 U.S. 355, 7 L.Ed.2d 798, 82 S.Ct. 780 (1962); and **Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.**, 355 U.S. 563, 2 L. Ed.2d 491, 78 S.Ct. 438 (1958).

[25] **Waterman Steamship Corp. v. David**, 353 F.2d 660, 665-666 (5th Cir., 1965), cert. den. 16 L.Ed.2d 683 (1966); **Moore-McCormack**

demnity are ones of fact calling for a determination by a jury. As the Court of Appeals stated in its opinion, there was a sharp dispute as to whether the accident resulted from a reported malfunction of one of the winches or the failure of a winch operator to respond to a signal. In any event, there was sufficient evidence to support a jury's conclusion on either of the two ultimate issues, namely, whether or not the stevedore breached its implied contractual duty to the vessel owner and if the vessel owner's conduct was such as to preclude indemnity. With this being the case, this Court cannot substitute its conclusions on issues of fact which are for jury determination as Royal asks it to do.

CONCLUSION

Royal's concluding remarks asking for judgment in order to obviate the necessity of another trial are shocking indeed, for Royal, and Royal alone, is responsible for the incomplete and erroneous charge of which it now complains. Royal's predicament is wholly of its own making for the District Judge relied upon Royal's repeated assertions that the charge and interrogatories as prepared by Royal were in all respects proper[26] and that Strachan's requested interrogatories and charge, together with the objections and

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Lines, Inc. v. Maryland Ship Ceiling Co., 311 F.2d 663 (4th Cir., 1962) (Interrogatories at page 666) (669—jury makes final general determination on indemnity); **McNamara v. Weichsel**, 293 F.2d 900, 904 (2d Cir., 1961) ("Here there were at least two important fact questions. Was there substandard performance of its stevedoring contract by Pittston? Was there conduct by Weichsel sufficient to bar recovery?")

[26] R. 51, 77, 84.

exceptions, were without merit.[27] How can Royal after leading the Trial Court into giving a charge and a set of interrogatories replete with errors, contradictions and confusion have the audacity to request this Court to enter judgment in its favor by calling for an end to litigation before a District Judge who it says by implication is prejudiced?

Because of Royal, at no time was the jury given the opportunity to pass upon the ultimate issues in this case, and the limited issues given to the jury were submitted in an improper manner. It cannot now be heard to complain of its own errors.

Strachan respectfully submits that Royal's Petition for Writ of Certiorari should be denied and that Strachan's Petition for Writ of Certiorari in No. 741 should be granted.

Respectfully submitted,

E. D. VICKERY

Of Counsel:

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[27] Strachan pointed out to the Trial Court in its exceptions to the charge and interrogatories that there was no inquiry as to whether or not the stevedore breached its warranty of workmanlike service (R. 72) or if the vessel owner's conduct was sufficient to preclude indemnity (R. 76), and when the Trial Court inquired of Royal if any objections were in order, the reply given was "None is good, sir." (R. 77)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief of Appellee was served on the attorneys for the Appellant, Messrs. Burlingham, Underwood, Barron, Wright & White, William M. Kimball, of counsel, 26 Broadway, New York, New York 10004, and Messrs. Eastham, Watson, Dale & Forney, John P. Forney, Jr., of counsel, Esperson Building, Houston, Texas 77002, attorneys for the Appellant, Royal Netherlands Steamship Company, by mailing copies of said brief to said attorneys at the addresses shown above by first class mail, air mail to New York, postage prepaid, on this the 25th day of November, 1966.

E. D. Vickers

OF ROYSTON, RAYZOR & COOK

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IN THE

Supreme Court of the United States

October Term, 1966

No. 729

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Petitioner,

—against—

STRACHAN SHIPPING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Respondent Strachan's opposing brief largely repeats its arguments in its pending petition in No. 741 that ultimate determination of whether Strachan breached its warranty of workmanlike service, and of whether petitioner Royal's conduct precluded recovery of indemnity, are fact issues which the trial court is conclusively deemed to have found in Strachan's favor by operation of F. R. Civ. P. 49(a). Royal's opposing brief in No. 741 explicates the fallacies of this argument.

Strachan's opposing brief in this case No. 729 also urges that the trial court's charge was fatally inadequate because it did not define or request a finding of "proximate cause" with an appended requirement of "foreseeability"; did not expound and then excise from jury consideration the legal

obligations of Royal and Strachan to the injured longshoreman; and did not state that Royal had the burden of proof.

Strachan requested an elaborate charge on "proximate cause", including that: "To be a proximate cause of an event it should be reasonably anticipated and foreseen by a person of ordinary prudence in the exercise of ordinary care that such event or some similar event would result from such cause as a natural and probable consequence" (R. 91). However, *Italia Soc.* v. *Oregon Stevedoring Co.*, 376 U. S. 315 (1964), which held that a stevedore breached its warranty of workmanlike service by non-negligently furnishing latently defective gear, refutes the notion that the shipowner cannot recover indemnity without proof that the stevedore actually foresaw the damaging consequences of its warranty breach. The foreseeability of such damage is imputed by law. *De Gioia* v. *United States Lines*, 304 F. 2d 421, 426 (2 Cir. 1962); *Revel* v. *American Export Lines, Inc.*, 162 F. Supp. 279, 288 (E. D. Va. 1958), aff'd 266 F. 2d 82.

Here, every reasonably inferable cause of the accident was submitted for jury decision by "written questions susceptible of categorical or other brief answer", F. R. Civ. P. 49(a), and the jury found that a variety of contributing faults by Strachan were the sole cause of the accident, thereby mandating entry of judgment for Royal as a matter of law. *American Export Lines* v. *Atlantic & Gulf Stevedores*, 313 F. 2d 414, 416 (4 Cir. 1963), cert. denied 373 U. S. 924.

Furthermore, since a primary goal of F. R. Civ. P. 49(a) is to obviate complex, legalistic jury charges, *R. H. Baker & Co.* v. *Smith-Blair, Inc.*, 331 F. 2d 506, 511 (9 Cir. 1964),

use of the special verdict freed the trial court of any need to use or explain "the good old fashioned dialectic of proximate causation with all of its built-in metaphysical concepts of natural and unbroken sequence, but for, foreseeability of harm and the like." *Page* v. *St. Louis Southwestern Railway Co.*, 349 F. 2d 820, 822, 824, 827 (5 Cir. 1965).

It also was unnecessary, and there were cogent reasons not to, muddle the jury with cautionary instructions respecting the distinction between Royal's and Strachan's liability to the injured longshoreman and Strachan's liability to Royal. F. R. Civ. P. 49(a) instructs that the "court shall give to the jury such explanation • • • as may be necessary to enable the jury to make its findings upon each issue • • • of fact raised by the pleadings or by the evidence." There was no such issue concerning Strachan's obligations to the injured longshoreman, who had long ago received his workmen's compensation benefits from Strachan, and who never sued for or could have recovered damages from Strachan. The longshoreman's suit against Royal having been previously settled, the entire litigation and all issues of fact raised by the pleadings and by the evidence pertained solely to Strachan's liability to Royal.

The conduct of the trial could have left no doubt in the jury's mind as to who had the burden of proof even if the form of the special interrogatories did not reduce to insignificance any failure to make specific mention of that in the charge, to which Strachan took no exception on this account.

Strachan leaves unassailed Royal's position that its motions for a directed verdict or judgment notwithstanding the verdict should have been granted, whereupon the suffi-

ciency of the charge becomes abstract. *Vecchio* v. *Anheuser-Busch, Inc.*, 328 F. 2d 714, 715 (2 Cir. 1964), cert. denied 379 U. S. 831.

It is respectfully submitted that Royal's petition should be granted.

Respectfully submitted,

WILLIAM M. KIMBALL
Counsel for Petitioner

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Opinion Below, Jurisdiction, and Rule Involved

The official report of the opinion below, the jurisdictional requisites, and the portions of F. R. Civ. P. 49(a) involved are adequately set forth on pages 1 and 2 of the petition.

Questions Presented

1. Is ultimate determination of whether the stevedore breached its warranty of workmanlike service to the shipowner, or of whether the shipowner is precluded from recovering indemnity from the stevedore, a finding of fact or a conclusion of law?

2. Does failure by the shipowner to halt the stevedore's operations in order to repair a reportedly defective winch raise a factual question of whether the shipowner is precluded from recovering indemnity for the stevedore's breach of warranty of workmanlike service, particularly if the jury finds that the stevedore's continued operation of the winch was not a contributing cause of the accident?

3. Where the trial court denied the stevedore's request to submit interrogatories to the jury on the ultimate questions of whether the stevedore breached its warranty of workmanlike service and of whether the shipowner was precluded from recovering indemnity and, after stating that the special verdict in favor of the shipowner left him "in a state of confusion and doubt", the trial judge directed entry of judgment for the stevedore, does F. R. Civ. P. 49(a) create an irrefutable presumption that the judgment was entered on the verdict and that the trial court implicitly found that the stevedore did not breach its warranty and that the shipowner was precluded from recovering indemnity?

Statement

The essential facts are set forth on pages 3-7 of Royal Netherlands Steamship Company's pending petition for certiorari in No. 729 and all record references are to pages of the record filed in that case.

The only additional evidence in the record which pertains in any manner to Strachan Shipping Company's petition in this case No. 741 is testimony by the injured longshoreman that previous difficulty with the winches caused several loads of pipe to jerk (R. 11-12); testimony by one of the winchmen and by the gang boss that another winchman mentioned that he told a mate about some unspecified

winch trouble (R. 26-28); testimony by the other winchman that both before and at the time of the accident his winch "ran away" (R. 36-37); and testimony by a ship's officer that if the mate on deck observed anything seriously wrong with the operating condition of a winch, he should notify his superior and the stevedore foreman, halt the cargo operation, and get the ship's engineer to repair the winch (R. 29-32).

The trial court denied Strachan's requests to charge that the shipowner, Royal, had the burden of proving that its own conduct precluded it from recovering indemnity from the stevedore, Strachan, (R. 98) and that Royal could be denied indemnity if Royal failed to halt Strachan's operations so that Royal could repair a winch which Strachan had reported to be defective (R. 95, 99). The trial court also refused Strachan's requests to submit special interrogatories to the jury on the ultimate questions of whether Strachan breached its warranty of workmanlike service to Royal (R. 102) and of whether Royal was precluded from recovering indemnity for Strachan's breach of warranty (R. 103).

Argument

Strachan's petition assumes, erroneously, that ultimate determination of whether Strachan breached its warranty and of whether Royal was precluded from recovering indemnity are factual findings; that Royal's failure to halt Strachan's operations so as to repair the reportedly defective winch could preclude Royal from recovering indemnity; and that by operation of F. R. Civ. P. 49(a), the trial court found that Strachan did not breach its warranty and that Royal was precluded from recovering indemnity.

I. Ultimate determination of whether a stevedore's conduct amounts to a breach of its warranty of workmanlike service "is a naked conclusion of law". *Halliburton Co.* v. *Norton Drilling Co.*, 302 F. 2d 431, 435 (5 Cir. 1962), rehear. denied 313 F. 2d 380, cert. denied 374 U. S. 829. Thus, in *Drago* v. *A/S Inger*, 305 F. 2d 139, 142 (2 Cir. 1962), cert. denied 371 U. S. 925, the "conclusion that the conduct of the stevedoring company * * * fell short of that 'workmanlike service' that it warranted to the shipowner" was based upon "findings as to the underlying evidentiary facts relevant to the indemnity claim".

Here, the trial court properly submitted to the jury under F. R. Civ. P. 49(a) questions which required categorical findings of disputed evidentiary facts (R. 177-180) upon which the court could and should have concluded as a matter of law that Strachan breached its warranty of workmanlike service to Royal. Since the jury cannot decide questions of law, such questions should not be put to the jury under F. R. Civ. P. 49(a), *Theodorf* v. *Lipsey*, 237 F. 2d 190, 193 (7 Cir. 1956); *Ratigan* v. *New York Central Railroad Co.*, 291 F. 2d 548, 554 (2 Cir. 1961), cert. denied 368 U. S. 891. Hence, the trial court properly denied Strachan's request to submit to the jury the ultimate legal question of whether Strachan breached its warranty of workmanlike service and the trial court cannot be deemed to have inferentially answered that question in favor of Strachan by operation of F. R. Civ. P. 49(a) since the question is not one of fact.

II. Ultimate determination of whether Royal's conduct precluded it from recovering indemnity is also a conclusion of law and was so treated in, among other cases cited in this brief, *Drago* v. *A/S Inger, supra*, 305 F. 2d, p. 143; *Ameri-*

can Export Lines, Inc. v. *Revel, infra,* 266 F. 2d, p. 87; *Misurella* v. *Isthmian Lines, Inc., infra,* 215 F. Supp., pp. 862-863, 328 F. 2d, pp. 41-42; and *Mortensen* v. *A/S Glittre, infra,* 348 F. 2d, pp. 384-385. Thus, the trial court properly denied Strachan's request to submit this ultimate legal question to the jury and cannot be deemed to have inferentially answered that question in favor of Strachan by operation of F. R. Civ. P. 49(a).

Furthermore, even if the jury's answers to special interrogatories Nos. 3, 4, and 11 (R. 178, 180) had not eliminated continued operation of the defective winch as a causal factor, any failure by Royal to halt Strachan's operation of the winch in order to repair any reported defect could not, as a matter of law, preclude Royal from recovering indemnity from Strachan.

In *American Export Lines, Inc.* v. *Revel,* 266 F. 2d 82, 83, 87 (4 Cir. 1959), the court held that the fact that the ship's mate, to whom the stevedore reported a defective winch, not only did not stop the operation but actually instructed the longshoremen to continue running the winch "as best they could", did not constitute indemnity precluding conduct by the shipowner as a matter of law.

In *Misurella* v. *Isthmian Lines, Inc.,* 215 F. Supp. 857, 859, 863 (S. D. N. Y. 1963), aff'd 328 F. 2d 40, 41-42, the district court held and the circuit court affirmed that negligent failure by the ship's mate to correct an unsafe condition, although specifically and repeatedly requested to do so by the stevedore, did not bar recovery of indemnity by the shipowner as a matter of law. *Albanese* v. *N.V. Nederl. Amerik., etc.,* 346 F. 2d 481, 483-484 (2 Cir. 1965), stevedore's petition for certiorari denied 382 U. S. 283, is in accord, even though the mate induced the stevedore to con-

tinue its operations by promising that the defective condition would shortly be rectified.

In *Mortensen* v. *A/S Glittre,* 348 F. 2d 383, 385 (2 Cir. 1965), the court reaffirmed its conclusion that, to be precluded from indemnity, the shipowner's conduct "must at least prevent or seriously handicap the stevedore in his ability to do a workmanlike job" which, as pointed out in the *Misurella* and *Albanese* decisions, *supra,* cannot occur as a matter of law if, after notice of a defective condition, the stevedore fails to stop its own operations until the defect is corrected.

In *T. Smith & Son, Inc.* v. *Skibs A/S Hassel,* 362 F. 2d 745, 747 (5 Cir. 1966), after referring to "the general rule that negligence by the shipowner is not a bar to recovery" of indemnity, the court held that if "the stevedore has knowledge of a defect it should correct it or require it to be corrected by the ship's officers", failing which there is a "clear" breach of the stevedore's warranty of workmanlike service.

Misurella, supra, 215 F. Supp., p. 863, and *Pacific Far East Lines* v. *California Stevedore & Ballast Co.,* 238 F. Supp. 956, 959 (N. D. Cal. 1965), rejected as obsolete and contrary to the weight of more recent authority the opinions in *Hagans* v. *Farrell Lines,* 237 F. 2d 477 (3 Cir. 1956), and *Smith* v. *Pan-Atlantic Steamship Corp.,* 161 F. Supp. 422 (E. D. Pa. 1957), aff'd 254 F. 2d 600, cited in footnote 15, page 9, of Strachan's petition, and the other case there cited, *Hodgson* v. *Lloyd Brasileiro, etc.,* 294 F. 2d 32, 35 (3 Cir. 1961), cert. denied 369 U. S. 848, is not pertinent since it involved a stevedore which did stop its operations upon discovering that the winch was defective and did not

resume work until "after receiving a categorical assurance from the shipowner's crew that it was 'O. K.' " following repairs by the ship's engineer, whereupon "the accident happened either after the very first or second attempt" by the stevedore to use the supposedly repaired winch. Here, Strachan never stopped its operations after learning of the defect and none of the ship's crew ever assured Strachan that it would be "O. K." to continue using the winch.

The assertion that Royal's indemnity claim could be defeated because Royal did not halt Strachan's operations so that Royal could repair a reportedly defective winch is simply an attempt by Strachan to "use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense", which was rejected as a matter of law in *Ryan Stevedoring Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124, 134-135 (1956), and *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U. S. 563, 568 (1958).

III. Even if the ultimate questions of whether Strachan breached its warranty and of whether Royal's conduct precluded indemnity were factual, the trial court could not be deemed to have implicitly found those facts in Strachan's favor by operation of F. R. Civ. P. 49(a).

Since it was the trial court's function to propound legally sufficient interrogatories to the jury, *Atkinson* v. *Roth*, 297 F. 2d 570, 575 (3 Cir. 1961), the court presumably felt that the interrogatories which it submitted were all those needed to enable the jury to make findings upon every essential issue of fact. Yet, faced with a special verdict which plainly mandated a judgment for Royal, but which left the trial court "in a state of confusion and doubt" (R. 168), the court directed that judgment be entered in favor of Strachan.

Under F. R. Civ. P. 49(a), the trial court is deemed to have implicitly made findings of omitted issues of fact only if judgment is entered "on the special verdict". Strachan's petition concedes, as it must, that the jury's answers to the special interrogatories "were in no way relied on by the Trial Court in entering judgment for Strachan", page 6, and that the "judgment of the Trial Court below does not depend to the slightest extent on any of the answers of the jury", page 12.

This is necessarily so because the jury found (R. 177-180) that the sole contributing causes of the accident were numerous errors and omissions by Strachan in violation of "basic uniform safe practices" (R. 131), Strachan's own contract "General Safety Rules" (R. 118-119), and the failure of Strachan's employees "to be more careful" (R. 147-148) which quite apart from the finding that the injured Strachan longshoreman was contributorily negligent (R. 180), amounted, as a matter of law, to a flagrant breach of "the stevedore's obligation to perform with reasonable safety", *Italia Societa, etc.* v. *Oregon Stevedoring Co.*, 376 U. S. 315, 319 (1964). What the trial court did was to completely disregard the special verdict and, in effect, enter another summary judgment for Strachan, contrary to *Koninklyke Nederlandsche, etc.* v. *Strachan Shipping Co.*, 301 F. 2d 741 (5 Cir. 1962), rehear. denied 304 F. 2d 545, cert. denied 371 U. S. 921.

CONCLUSION

For the foregoing reasons it is respectfully submitted that Strachan's petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent